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May 18, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: September 21, 2004

Case No.: TIA-0210

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits. The OWA referred the application to an independent Physician Panel (the Panel), which determined that the illnesses were not related to work at the DOE. The OWA accepted the Panel's determination. The Applicant's son and authorized representative (the Appellant) filed an Appeal with the DOE's Office of Hearings and Appeals (OHA), stating that the Applicant had died and that he (the son) was in the process of preparing a request to become the applicant. As explained below, we have determined that the appeal should be denied.

I. Background

A. The Relevant Statute and Regulations

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B established a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D established a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part 852 (the Physician Panel Rule). The OWA was responsible for this program.

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a physician panel, a negative determination by a physician panel that was accepted by the OWA, and a final decision by the OWA not to accept a physician panel determination in favor of an applicant. The instant appeal was filed pursuant to that section. The Applicant sought review of a negative determination by a physician panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

While the appeal was pending, Congress repealed Subpart D. Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004) (the Authorization Act). Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, all Subpart D claims will be considered as Subpart E claims. *Id.* § 3681(g). In addition, under Subpart E, an applicant is deemed to have an illness related to a workplace toxic exposure at DOE if the applicant received a positive determination under Subpart B. *Id.* § 3675(a).

During the transition period, in which DOL sets up the Subpart E program, OHA continues to process appeals of negative OWA determinations.

B. Procedural Background

The Applicant filed Subpart B and Subpart D applications, claiming colon cancer and skin cancer. The Applicant worked at the Oak Ridge Y-12 plant for 32 years, from 1944 to 1976. The DOL referred the Subpart B application to the National Institute of Occupational Safety and Health (NIOSH) for a radiation dose reconstruction. The Applicant elected to have his Subpart D application referred to the Physician Panel without awaiting the results of the dose reconstruction.

The Physician Panel issued a negative determination on both illnesses. The Panel stated that the Applicant was exposed to mercury, lithium hydroxide, beryllium, and radiation, but found that his exposures were not a significant factor in his illnesses. The Panel stated that colon cancer is the third most common cancer in the United States, and the Panel discussed various risk factors. The Panel explained its negative determination as follows: "Based on the tumor location, pathological diagnosis and 23 year post retirement primary occurrence, this colon cancer is most likely not related to his employment at the Y-12 facility." With respect to the claimed skin cancer, the Panel stated the

condition is most often found in sun exposed areas and that toxic exposures are not risk factors. The Panel found that the Applicant's skin cancer, which was on his scalp, was "triggered by sun exposure and unrelated" to his DOE employment.

The Appellant filed an appeal. The Appellant states that the Panel incorrectly stated that (i) the Applicant did not have toxic exposures and (ii) he had a "probable" history of colon cancer. The Appellant also states that (i) he believes there is additional exposure information and (ii) he wants to claim two additional illnesses.

II. Analysis

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to exposure to toxic substances during employment at a DOE facility. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to toxic exposure at the DOE site, and state the basis for that finding. 10 C.F.R. § 852.12. The Rule required that the Panel's determination be based on "whether it is at least as likely as not that exposure to a toxic substance" at DOE "was a significant factor in aggravating, contributing to or causing the illness." *Id.* § 852.8.

The Appellant has not identified Panel error. Contrary to the Appellant's argument, the Panel acknowledged that the Applicant was exposed to the identified toxic chemicals, but stated that toxic exposures were not a risk factor for his prostate cancer or his skin cancer. Moreover, the Panel's reference to a "probable" family history of colon cancer is, at most, harmless error. The Panel's view was that exposure to toxic substances was not a risk factor and that the location, pathology, and timing of the Applicant's prostate cancer was consistent with that view. The Appellant's objections are ultimately a disagreement with the Panel's medical judgment, rather than an indication of Panel error.

The Appellant's arguments about additional exposure information and additional illnesses also do not indicate Panel error. As stated above, the Panel did not view toxic exposures as risk factors for the claimed illnesses and, therefore, additional information on exposures would not affect its determination. If the Appellant wishes to claim additional illnesses, he should contact the DOL concerning how to proceed.

As the foregoing indicates, the Appellant has not identified Panel error and, therefore, the appeal should be denied. In compliance with Subpart E, the claim will be transferred to the DOL for review. The DOL is in the process of developing procedures for evaluating and issuing decisions on these claims. OHA's grant of this appeal does not purport to dispose of or in any way prejudice the DOL's review of the claim under Subpart E.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy, Case No. TIA-0210, be, and hereby is, denied.
- (2) The denial pertains only to the DOE appeal and not to the DOL's review of these claims under Subpart E.
- (3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: May 18, 2005